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# State v. Weaver Appellant's Brief Dckt. 41270

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 41270
Plaintiff-Respondent,	)	
	)	TWIN FALLS COUNTY
v.	)	NO. CR 2013-1914
	)	
CHRISTOPHER WEAVER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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BRIEF OF APPELLANT

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APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS

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HONORABLE RANDY J. STOKER  
District Judge

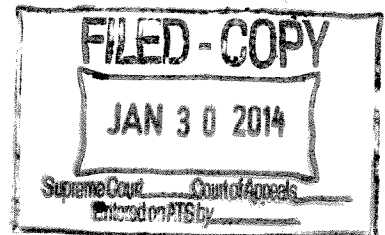
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## STATEMENT OF THE CASE

### Nature of the Case

Pursuant to a plea agreement, forty-two-year-old Christopher Thomas Weaver pleaded guilty to felony possession of a controlled substance. The district court imposed a unified sentence of seven years, with one year fixed. The district court also ordered Mr. Weaver to pay a total amount of \$689.63 in restitution, including \$300.00 to the Twin Falls County Prosecuting Attorney, as well as \$280.50 in court costs. About two weeks later, a deputy clerk of the district court filed an Affidavit and Notice of Failure to Pay, stating that Mr. Weaver had failed to pay the court costs and restitution, and, if the monies remained unpaid, it would send the unpaid balance to a collection agency with an additional 33% of the monies owed to be charged as a collection fee. Mr. Weaver then filed an objection to the order of restitution, which the district court denied. On appeal, Mr. Weaver asserts that the district court abused its discretion when it denied his objection to the order of restitution, because substantial evidence did not support the amount of restitution awarded to the Twin Falls County Prosecuting Attorney, and the district court actually had discretion to extend the time frame to pay in the restitution order.

### Statement of the Facts and Course of Proceedings

The State charged Mr. Weaver with possession of a controlled substance, felony, in violation of Idaho Code § 37-2732(c)(1). (R., pp.5-6, 43-45.) Mr. Weaver subsequently entered into a plea agreement, whereby he would plead guilty to possession of a controlled substance and the parties would stipulate to a unified sentence of seven years, with one year fixed. (R., pp.46-56.) Mr. Weaver also agreed to “[p]ay restitution to ‘law enforcement agencies’ as outlined in I.C. § 37-2732(k) and/or

§ 18-8003(2),” but the amount of restitution was to be determined by the district court. (See R., pp.46, 52.) The district court accepted Mr. Weaver’s guilty plea. (R., p.58.)

The Twin Falls Prosecuting Attorney’s Office then filed, pursuant to I.C. § 37-2732(k), a Restitution Request asking for a total restitution award of \$300.00 for four hours of “attorney time.” (R., pp.62-64.) The district court subsequently imposed a unified sentence of seven years, with one year fixed. (R., pp.65-71.) The district court also ordered Mr. Weaver to pay a total amount of \$689.63 in restitution, as documented in the “State’s Order of Restitution.” (R., pp.65, 68.) The restitution order broke down the total amount to be awarded as follows: \$100.00 to the Idaho State Police, \$289.63 to the Twin Falls Police Department, and \$300.00 to the Twin Falls County Prosecuting Attorney. (R., pp.72-74.) Additionally, the district court ordered Mr. Weaver to pay \$280.50 in court costs. (R., p.68.) The district court gave Mr. Weaver thirty days to object to restitution. (R., p.65.)

About two weeks later, a deputy clerk of the district court filed an Affidavit and Notice of Failure to Pay, stating that Mr. Weaver had failed to pay the court costs and restitution, for a total balance due of \$970.13. (R., p.75.) The affidavit further stated that “if the monies owed are not paid in full by July 11, 2013 [one month from the date of the affidavit and notice] pursuant to statute, a **collection agency** will seek to collect any unpaid monies and will charge an **additional 33%** of the money owed as a collection fee.” (R., p.75 (emphases in original).) By the time the affidavit and notice was filed, Mr. Weaver had been committed to the custody of the Twin Falls County Sheriff for delivery to the state penitentiary. (See R., p.69.)

Mr. Weaver then filed a timely Objection to Order of Restitution, and requested a hearing on his objection to the order of restitution. (R., pp.76-79.) At the objection to

restitution hearing, Mr. Weaver raised two issues: “The first is the time frame to pay. . . . And the next is that [Mr. Weaver] wants the prosecutor to account for the four hours that they have – that they listed that they spent on the – in their restitution request.” (Tr., p.3, L.25 – p.4, L.6.) The State argued that the restitution request was reasonable and should be upheld. (Tr., p.9, Ls.15-17.) The State left the matter of extending the time frame to pay in the district court’s discretion. (Tr., p.9, Ls.18-23.)

The district court found that the requested restitution amounts for drug testing, law enforcement time, and prosecutor’s time were all reasonable. (Tr., p.10, Ls.13-24, p.11, Ls.5-8, p.12, L.25 – p.13, L.2) Thus, the district court denied the objection to the restitution amount for the prosecutor’s time. (R., p.95; Tr., p.13, Ls.2-3.) The district court considered the objection to the time frame to pay restitution as, in effect, a timely Idaho Criminal Rule 35 (“Rule 35”) request for leniency, and then denied that Rule 35 motion/objection to timeliness. (Tr., p.14, Ls.5-7, p.16, Ls.10-16.) The district court believed that it was a “statutory obligation” of court clerks collect monies owed to the courts under the relevant statutes, and the district court did not have the jurisdiction to stop the clerk from turning unpaid balances over to a collection agency. (Tr., p.14, L.10 – p.16, L.9.) The district court specifically invited Mr. Weaver to file an appeal “because I’d like an answer out of our supreme court as to whether our analysis is correct . . . .” (Tr., p.16, Ls.18-20.)

Mr. Weaver then filed a Notice of Appeal timely from the district court’s denial of his objection to the order of restitution.<sup>1</sup> (R., pp.81-85.)

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<sup>1</sup> The hearing on the objection to the order of restitution was held on June 21, 2013. (R., p.80.) The Notice of Appeal was filed on July 24, 2013. (R., p.81.) The written Order Denying Objection to Restitution Request was filed on August 2, 2013. (R., p.95.) Thus, pursuant to Idaho Appellate Rule 17(e)(2), the Notice of Appeal matured and

## ISSUE

Did the district court abuse its discretion when it denied Mr. Weaver's objection to the order of restitution?

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became valid upon the filing of the Order Denying Objection to Restitution Request. See *State v. Gissel*, 105 Idaho 287, 290 (Ct. App. 1983).



## ARGUMENT

### The District Court Abused Its Discretion When It Denied Mr. Weaver's Objection To The Order Of Restitution

#### A. Introduction

Mr. Weaver asserts that the district court abused its discretion when it denied his objection to the order of restitution. Substantial evidence did not support the amount of restitution awarded to the Twin Falls County Prosecuting Attorney.<sup>2</sup> Further, the district court actually had discretion to extend the time frame to pay in the restitution order.

#### B. Standard Of Review And Relevant Law

"Restitution may be ordered by the district court under I.C. § 37-2732(k) once a defendant is convicted of, or pleads guilty to, a crime under Title 37, Chapter 27 of the Idaho Code." *State v. Gomez*, 153 Idaho 253, 257-58 (2012). Section 37-2732(k) is applicable to Mr. Weaver because he pleaded guilty to possession of a controlled substance, in violation of I.C. § 37-2732(c)(1). Pursuant to Section 37-2732(k), "the court may order restitution for costs incurred by law enforcement agencies in investigating the violation." I.C. § 37-2732(k). Law enforcement agencies "include . . . the Idaho state police, county and city law enforcement agencies, the office of the attorney general and city and county prosecuting attorney offices." *Id.* Costs "include . . . those incurred for the purchase of evidence, travel and per diem for law enforcement officers and witnesses throughout the course of the investigation, hearings and trials, and any other investigative or prosecution expenses already incurred, including regular salaries of employees." *Id.*

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<sup>2</sup> At the objection to restitution hearing, with respect to the amounts of restitution awarded, Mr. Weaver only challenged the amount of restitution awarded to the Twin Falls County Prosecuting Attorney. (See Tr., p.3, L.25 – p.4, L.6.)

The Idaho Supreme Court, in a case involving a Section 37-2732(k) restitution order, stated, “Since I.C. § 37-2732(k) is short of specific guidance regarding the nature of a restitution award or the procedure to obtain such an award, we find guidance in the general restitution statute, I.C. § 19-5304.” *Gomez*, 153 Idaho at 258. With respect to restitution ordered pursuant to the general restitution statute, an appellate court “will not overturn an order of restitution unless an abuse of discretion is shown.” *State v. Smith*, 144 Idaho 687, 692 (Ct. App. 2007). “When a trial court’s discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason.” *Id.* (citing *State v. Hedger*, 115 Idaho 598, 600 (1989)).

C. The District Court Abused Its Discretion When It Denied Mr. Weaver’s Objection To The Order Of Restitution, Because Substantial Evidence Did Not Support The Amount Of Restitution Awarded To The Twin Falls County Prosecuting Attorney

Mr. Weaver asserts that the district court abused its discretion when it denied his objection to the order of restitution, because substantial evidence did not support the amount of restitution awarded to the Twin Falls County Prosecuting Attorney.

The general restitution statute provides that, “Restitution shall be ordered for any economic loss which the victim actually suffers.” I.C. § 19-5304(2). “Economic loss shall be based upon the *preponderance* of evidence submitted to the court by the prosecutor, defendant, victim or presentence investigator.” I.C. § 19-5304(6) (emphasis added). “Each party shall have the right to present such evidence as may be relevant to the issue of restitution, and the court may consider such hearsay as may be contained

in the presentence report, victim impact statement or otherwise provided to the court.” *Id.* “The district court’s factual findings with regard to restitution will not be disturbed on appeal if supported by substantial evidence.” *State v. Straub*, 153 Idaho 882, 885 (2013) (internal quotation marks omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept to support a conclusion.” *Id.*

Mr. Weaver submits that substantial evidence did not support the amount awarded to the Twin Falls County Prosecuting Attorney in the district court’s Section 37-2732(k) restitution order. The prosecutor’s time request, while it purported to break down the requested amount by the time spent on each aspect of the case (see R., pp.62-63), did not adequately document the time spent. For example, Mr. Weaver expressly disputed the time claimed by the prosecutor for his first appearance. (Tr., p.4, L.20 – p.5, L.16; see R., p. 62.) At the objection to restitution hearing, Mr. Weaver’s counsel explained that Mr. Weaver was “wondering why, for instance, it takes them 12 minutes to attend his first appearance when his time at the table in his first appearance was less than 30 seconds.” (Tr., p.4, Ls.20-25.) Mr. Weaver’s counsel also stated that “obviously there are some other times, I’m sure, that factor into this, but there’s no explanation as to what those times may be.” (Tr., p.5, Ls.5-7.)

Further, at the objection to restitution hearing the State admitted that the prosecutor’s time request was “an estimation,” and that, “We don’t spend a lot of time tracking the numbers.” (Tr., p.9, Ls.6-8.) The State did not attempt to provide additional evidence in support of the requested amount, but instead argued that the amount was “reasonable” because spending more time tracking the numbers “would certainly inflate the amount of time spent on determining how much restitution would be owed” and add “additional times . . . that we could have that would also inflate that number.” (See

Tr., p.9, Ls.8-14.) Based on the time discrepancy for the first appearance, and the State's own admission that the prosecutor's time request was an estimation, it cannot be said the prosecutor's time request was supported by any "relevant evidence as a reasonable mind might accept to support a conclusion." See *Gomez*, 153 Idaho at 258. Thus, substantial evidence did not support the restitution amount awarded to the Twin Falls County Prosecuting Attorney.

Because substantial evidence did not support the amount of restitution awarded to the Twin Falls County Prosecuting Attorney in the district court's I.C. § 37-2732(k) restitution order, the district court abused its discretion when it denied Mr. Weaver's objection to the order of restitution. See *Straub*, 153 Idaho at 885. The award of restitution to the Twin Falls County Prosecuting Attorney should be reversed.

D. The District Court Abused Its Discretion When It Denied Mr. Weaver's Idaho Criminal Rule 35 Request/Objection To Timeliness, Because It Actually Had Discretion To Extend The Time Frame To Pay In The Restitution Order

Mr. Weaver asserts that the district court abused its discretion when it denied his Idaho Criminal Rule 35 request/objection to timeliness, because it did not correctly perceive the issue as one of discretion. Contrary to its belief, the district court actually had discretion to extend the time frame to pay in the restitution order.

It appears that I.C. § 37-2732(k) does not contain language specifically governing the execution or collection of its restitution orders. Looking to the general restitution statute for guidance, the statute following I.C. § 19-5304 in the Idaho Code provides that, "After forty-two (42) days from the entry of the order of restitution or at the conclusion of a hearing to reconsider an order of restitution, whichever occurs later, and order of restitution may be recorded as a judgment and the victim may execute as provided by law for civil judgments." I.C. § 19-5305(1); see also *Gomez*, 153 Idaho at

258 (quoting I.C. § 19-5305 as the statute governing the recording and execution of restitution orders pursuant to I.C. § 37-2732(k)). Additionally, “The clerk of the district court may take action to collect on the order of restitution on behalf of the victim and, with the approval of the administrative district judge, may use the procedures set forth in section 19-4708, Idaho Code, for the collection of the restitution.” I.C. § 19-5305(2).

Section 19-4708 provides that, “The supreme court, or the clerks of the district court with the approval of the administrative district judge, may enter into contracts in according with this section for collection services for debts owed to courts.” I.C. § 19-4708(1). “The cost of collection shall be paid by the defendant as an administrative surcharge when the defendant fails to pay any amount ordered by the court and the court utilizes the services of a contracting agent pursuant to this section.”<sup>3</sup> *Id.* The contract with the contracting agent must include a cost of collection fee, which “shall not exceed thirty-three percent (33%) of the amount collected” and “shall be deducted from the amount collected but shall not be deducted from the debts owed to courts.” I.C. § 19-4708(4).

Mr. Weaver submits that the district court abused its discretion when it denied his request to extend the time to pay in the restitution order, because the district court did not recognize its discretion to extend the time to pay. As discussed above, Section 37-2732(k) provides that if a defendant is convicted of, or pleads guilty to, a crime under Title 37, Chapter 27 of the Idaho Code, a district court “may order restitution for costs

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<sup>3</sup> The statute defines “contracting agent” as “a person, firm or other entity who contracts to provide collection services, and “cost of collection” as “the fee specified in contracts to be paid to or retained by a contracting agent for collection services.” I.C. § 19-4708(2)(a) & (b). The definition of “debts owed to courts” includes “court costs,” “restitution,” and “other charges which a court judgment has ordered to be paid to the court in criminal cases, and which remain unpaid in whole or in part.” I.C. § 19-4708(2)(c).

incurred by law enforcement agencies in investigating the violation.” I.C. § 37-2732(k). The Idaho Court of Appeals has observed that “[t]he word ‘may’ [in § 37-2732(k)] is permissive, and it denotes the right to exercise discretion.” *State v. Mosqueda*, 150 Idaho 830, 835 (Ct. App. 2010). In *Mosqueda*, the Court concluded that, “should a trial court determine that the connection between the defendant’s conviction and the ‘investigative costs’ sought through the state’s restitution request is tenuous or that the amounts sought are inflated or unreasonably incurred, it possesses the discretion to deny all or part of the state’s restitution request.” *Id.*

The district court abused its discretion when it denied Mr. Weaver’s request to extend the time frame to pay the restitution order, because it did not correctly perceive the issue as one of discretion. Contrary to its belief, the district court actually had discretion under I.C. § 37-2732(k) to extend the time frame to pay in the restitution order. Nothing in I.C. §§ 19-5305, 19-4708 or 37-2732(k) specifically prohibits a district court from extending the time frame to pay in a restitution order. While *Mosqueda* does not directly control this issue, it indicates that a district court has broad discretion over matters involving restitution, including discretion to extend the time to pay in a restitution order without the defendant incurring a cost of collection fee. See *Mosqueda*, 150 Idaho at 835.

Further, district courts have exercised their discretion to extend a defendant’s time to pay restitution and other costs in the context of probation. District courts have discretion under I.C. § 19-2601(2) “to order monetary compensation to victims as a condition of probation.” *State v. Parker*, 143 Idaho 165, 168 (Ct. App. 2006); see *State v. Wagenius*, 99 Idaho 273, 279 (1978) (“[T]he payment of court costs and restitution are also proper and often very useful conditions of withheld judgments and

probation.”). A district court has even “wider discretion” under Section 19-2601 to order restitution as a condition of probation, as compared with ordering restitution under Section 19-5304. See *Parker*, 143 Idaho at 168.

Like I.C. §§ 19-5305, 19-4708 or 37-2732(k), nothing in Section 19-2601(2) specifically prohibits a district court from extending the time frame to pay restitution or other costs as a condition of probation. Thus, district courts have exercised their discretion to extend a defendant's time to make payments as a condition of probation. For example, in *State v. Breeden*, 129 Idaho 813 (Ct. App. 1997), the district court, on a stipulation of the parties, ordered the defendant to pay restitution in minimum monthly installments as a condition of the defendant's probation. *Id.* at 814. Similarly, in *State v. Walker*, 126 Idaho 508 (Ct. App. 1994), the district court, when it placed the defendant on supervised probation, ordered the defendant to pay a fine on a ten-month installment plan. *Id.* at 509. Considering both Section 19-2601(2) and Sections 19-5305, 19-4708 and 37-2732 do not specifically prohibit a district court from extending the time frame to pay restitution, it follows that a district court would also have discretion to extend a defendant's time to make payments pursuant to a restitution order without the defendant incurring a cost of collection fee.

Additionally, a district court has greater flexibility when awarding restitution under I.C. § 37-2732(k), as opposed to awarding restitution under the general restitution statute, I.C. § 19-5304. For example, under the general restitution statute a district court “*shall* order a defendant . . . to make restitution” unless “the court determines that an order of restitution would be inappropriate or undesirable.” I.C. § 19-5304(2) (emphasis added). In contrast, under Section 37-2732(k) a district court is less restricted, because it “*may* order restitution for costs incurred by law enforcement

agencies in investigating the violation.” I.C. § 37-2732(k) (emphasis added). Thus, even if a district court would not have discretion to extend the time to pay in a Section 19-5304 restitution order, this greater flexibility gives a district court discretion to extend the time to pay in a Section 37-2732(k) restitution order to allow a defendant more time to pay without incurring a cost of collection fee.

In light of the above considerations, the district court here actually had discretion under I.C. § 37-2732(k) to extend the time frame to pay in the restitution order. Thus, the district court abused its discretion when it denied Mr. Weaver’s Idaho Criminal Rule 35 request/objection to timeliness, because it did not correctly perceive the issue as one of discretion. The order of restitution should be vacated with respect to the time frame to pay, and the case remanded to the district court for the district court to consider whether to extend the time frame to pay in the restitution order.

### CONCLUSION

For the above reasons, Mr. Weaver respectfully requests that this Court reverse the district court’s award of restitution to the Twin Falls County Prosecuting Attorney, vacate the order of restitution with respect to the time frame to pay, and remand his case to the district court with instructions to consider whether to extend the time frame to pay in the restitution order.

DATED this 30<sup>th</sup> day of January, 2014.

  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30<sup>th</sup> day of January, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

CHRISTOPHER WEAVER  
INMATE #107693  
SICI  
PO BOX 8509  
BOISE ID 83707

RANDY J STOKER  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

ROBIN AMBROSE  
TWIN FALLS COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'Evan A. Smith', with a large, stylized flourish extending from the end of the signature.

EVAN A. SMITH  
Administrative Assistant

BPM/eas